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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MERCK & CO., INC.,
Petitioner,

v.

CHARLES A. BOWSHER, COMPTROLLER GENERAL
OF THE UNITED STATES

and

UNITED STATES OF AMERICA

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PHILIP A. LACOVARA
RONALD A. STERN*
PETER A. BARNES

HUGHES HUBBARD & REED
1201 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 626-6200

Attorneys for Petitioner
Merck & Co., Inc.

**Counsel of Record*

QUESTIONS PRESENTED

1. Whether a contractor's records relating to its costs are "directly pertinent" to a government contract, within the meaning of the access-to-records statutes, 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c), when the contract price is set at a fixed amount, without reference to the contractor's costs, in accordance with procurement statutes that treat the price established in the public market as the fair price for products purchased by the government.

2. Whether the limited authority granted to the Comptroller General under the access-to-records statutes, 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c), to audit individual government contracts may be employed to demand access to private corporate records for a different, unauthorized purpose.

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Merck & Co., Inc.[1] ("Merck") conditionally cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case. Merck requests that this petition be granted if the Court grants the petition filed by the Solicitor General on behalf of the Comptroller General and the United States in

[1] Merck's non-wholly-owned subsidiaries, set forth here in compliance with Rule 28.1, are Arramara Teoranta, Associated Pharmaceutical Products Limited, BAC Japan Co. Ltd., Calgon Far East Co., Ltd., Chemex, Inc., Ferlux Labo S.A., Ferlux S.A., Kelp Industries Pty. Limited, Kiinteisto oy Irmelinpesa, Mannings Limited, Marupi-Merck Sharp & Dohme K.K., Merck Sharp & Dohme of India Limited, Merck Sharp & Dohme (New Zealand) Limited, Merck Sharp & Dohme of Pakistan Limited, Merck Sharp & Dohme (Thailand) Ltd., and Nippon Merck-Banyu Co., Ltd.

Bowsher v. Merck & Co., Inc., No. 81-1273 (filed January 7, 1982). Merck, however, opposes the grant of that petition.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A)[2] is not yet reported. The opinion of the district court (Pet. App. C) is not reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. B) was entered on September 10, 1981. On December 4, 1981, the Chief Justice, at the request of the Solicitor General, extended the time for filing a petition for a writ of certiorari to and including January 8, 1982. The government filed a petition for a writ of certiorari on January 7, 1982, and the petition was received by Merck on January 8, 1982. Merck files this cross-petition pursuant to Rule 19.5. The Court has jurisdiction over this cross-petition under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the statutes involved are as follows:

1. Section 4 of the Armed Services Act of 1947, as amended, 10 U.S.C. § 2313(b).

> (b) Except as provided in subsection (c), each contract negotiated under this chapter shall provide that the Comptroller General and his representatives are entitled, until the expiration of three years after final payment, to examine any books, documents, papers, or records of the contractor, or any of his

[2] References in the form "Pet. App." refer to the appendix to the government's petition for a writ of certiorari in No. 81-1273.

subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract.

2. Section 304 of the Federal Property and Administrative Services Act of 1949, as amended, 41 U.S.C. § 254(c).

> (c) All contracts negotiated without advertising pursuant to authority contained in this Act shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts. Under regulations to be prescribed by the Administrator, however, such clause may be omitted from contracts with foreign contractors or foreign subcontractors if the agency head determines, with the concurrence of the Comptroller General of the United States or his designee, that the omission will serve the best interests of the United States. However, the concurrence of the Comptroller General of the United States or his designee is not required for the omission of such clause—
>
> (1) where the contractor or subcontractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its books, documents, papers, or records available for examination; and
>
> (2) where the agency head determines, after taking into account the price and availability of the property or services from United States sources, that the public interest would be best served by the omission of the clause.

If the clause is omitted based on a determination under clause (2) a written report shall be furnished to the Congress. The power of the agency head to make the determination specified in the preceding sentences shall not be delegable.

STATEMENT

A. Introduction

This cross-petition involves one of five related cases that have challenged the lawfulness of identical notices served by the Comptroller General in August 1974.[3] The notices, based on the Comptroller General's authority to examine certain records of government contractors pursuant to 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c), demanded that Merck and five other pharmaceutical companies permit the Comptroller General to examine virtually all of the companies' cost records.

The Solicitor General has filed a petition seeking review of the aspect of the decision below holding that the Comptroller General exceeded his statutory authority in issuing a sweeping demand for access to records of Merck's indirect and unallocated costs. Merck believes that the government's petition should be denied for the reasons stated in its brief in opposition in No. 81-1273. Merck is filing this conditional cross-petition, however, to raise two closely related questions that should be considered if the Court decides to grant review in this case.

B. Origin Of The Comptroller General's Demands

The access-to-records demands served on Merck and five other pharmaceutical manufacturers in August 1974 were the

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[3] The four other cases are: *Staats v. Bristol Laboratories Division of Bristol-Myers Co.*, 451 U.S. 400 (1981), *affirming by an equally divided court*, 620 F.2d 17 (2d Cir. 1980); *SmithKline Corp. v. Staats*, No. 80-1464 (3rd Cir. Dec. 28, 1981), *conditional petition for cert. before judgment denied*, 449 U.S. 1038 (1980); *United States v. Abbott Laboratories*, 597 F.2d 672 (7th Cir. 1979); *Eli Lilly & Co. v. Staats*, 574 F.2d 904 (7th Cir.), *cert. denied*, 439 U.S. 959 (1978).

product of efforts by two Senators and their staff aides to secure cost data on individual pharmaceutical products. Pet. App. A, 7a; *SmithKline Corp. v. Staats*, No. 80-1464, slip op. at 3-5 (3rd Cir. Dec. 28, 1981), *conditional petition for cert. before judgment denied*, 449 U.S. 1038 (1980).[4] These efforts originated in January 1971 during hearings on competition in the drug industry. At the hearings, Senator Gaylord Nelson suggested that the Comptroller General invoke his access-to-records authority in order to "take a look at" the costs incurred by pharmaceutical companies.[5]

Despite the Comptroller General's expressly stated judgment that competitive market forces protected the government against unreasonable drug prices and that data for individual drug items might well prove meaningless, Senators Nelson and Kennedy and their staffs pressed the General Accounting Office (GAO) to employ the access-to-records provisions as a means of obtaining confidential cost data from drug companies. (C.A. App. 231-32; 474-77).[6]

GAO initially responded to this pressure by proposing a voluntary, two-phase study of the economics of the pharmaceutical industry. (C.A. App. 93-94, 105-09). Merck and five other manufacturers voluntarily stepped forward and agreed to participate in the first phase of the GAO study on the explicit understanding that it would not entail review of sensitive cost records pertaining to specific products. (C.A. App. 93).

After the companies participated in the extensive "Phase I" background study, GAO in March 1974 issued a proposal for its "Phase II" study, stating that the objective of this study was "to gather and develop the data necessary to make" a "presentation concerning salient economic and operational aspects of

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[4] The recent Third Circuit decision in *SmithKline* is reprinted as Appendix A to Merck's brief in opposition in No. 81-1273.

[5] *Hearings on Competitive Problems in the Drug Industry Before the Subcommittee on Monopoly of the Senate Select Committee on Small Business*, 92d Cong., 1st Sess. 8020 (1971).

[6] References in the form "C.A. App." are to the joint appendix filed by the parties in the court of appeals.

the industry." (C.A. App. 380). Merck and the other companies that participated in Phase I were willing to proceed with Phase II but expressed reservations about aspects of the proposed study that would have required them to give GAO access to highly confidential cost and pricing data without adequate assurances of confidentiality. (C.A. App. 94-95, 126-27). The Comptroller General concluded that confidentiality was consistent with the type of industry economic study in which he was interested, but the two Senators who had prompted the proposed GAO study objected since they were "primarily interested in the cost data from individual companies." (C.A. App. 317). As the Third Circuit recently found:

> "One of Senator Nelson's staff assistants, Ben Gordon, explicitly stated that specific cost and price data should be secured by individual company and product, and that 'such data should be made public.' Gordon demanded on behalf of Senator Nelson that the data be sought 'through the courts if necessary,' and 'without any strings attached so that the information could be used as needed.' Similarly, a staff assistant to Senator Edward Kennedy, chairman of a Senate subcommittee on health, insisted that the 'only way' the objectives of Senator Kennedy's subcommittee could be achieved was to 'publicize specific price and cost data for individual products.' " *SmithKline Corp. v. Staats, supra,* slip op. at 3-4.

Bowing to the Senators' wishes, the Comptroller General on August 26, 1974, issued formal access-to-records demands to the companies that had voluntarily come forward to participate in the Phase I study. (C.A. App. 49-50, 481). As the Third Circuit concluded: "GAO's sole reason for abandoning its voluntary program and resorting to formal demands was the Senators' refusal to approve any assurances of confidentiality." *SmithKline Corp. v. Staats, supra,* slip op. at 5.

C. Nature Of The Access-To-Records Demand In This Case

The August 1974 demands served on Merck and the other pharmaceutical companies represented an unprecedented and

unauthorized use of the Comptroller General's access-to-records authority. The record in this case establishes that GAO had *never before* attempted to use its access-to-records authority to collect data from contractors for an industry economic study (or any other purpose except contract audits). (C.A. App. 246-81). The unique nature of these access-to-records demands is underscored by the fact that *every instance* in which the Comptroller General employed his access-to-records authority in fiscal years 1974 and 1975 (the only years for which there is information in the record) involved individual audits of cost-based contracts in order to determine the accuracy of cost and pricing data supplied to government procurement officers during the negotiations of the contracts. (C.A. App. 147).

In contrast to the other contracts examined by GAO pursuant to its access-to-records authority in those years, the contracts listed in the Comptroller General's August 1974 access demands were all fixed-price rather than cost-based contracts. (C.A. App. 463). Merck's costs were legally irrelevant to the negotiation and performance of the contracts, because in each instance the contracting officer found competitive factors present that the procurement statutes and regulations recognize as assuring "the basic reasonableness of the price." (C.A. App. 206-07, 464). *See* 10 U.S.C. §§ 2304(g), 2306(f). As a result, there was no actual negotiation about price and no request that Merck submit cost or pricing data to the government contracting officer. (C.A. App. 462-63).

As in each of the related cases, the pharmaceutical products supplied under the Merck contracts were standard commercial items sold in substantial quantities in the public market. (C.A. App. 462). The price proposed by Merck for each contract was based on the "catalog price" at which Merck sold the item to the general public or was otherwise determined by adequate price competition. (C.A. App. 462-63). In each instance, the price paid by the government was the lowest price at which Merck sold the product to anyone at the time the contracts were awarded. (C.A. App. 462-63).

GAO has acknowledged that its access-to-records demands were not made in order to audit Merck's contracts and that it

does not suspect any impropriety by Merck or the contracting officers in connection with these contracts. (C.A. App. 44-46). GAO also has conceded that it does not question the reasonableness of the prices charged the government in connection with these contracts. (C.A. App. 142, 216).[7]

D. Scope Of The Records Demanded

The Comptroller General has asserted a sweeping definition of what records the GAO is entitled to review as "directly pertinent" to these four non-cost-based government contracts. The demand covers, but is not limited to, all records of the company's "experienced costs," all records that are "support for [the] prices charged to the Government," and "such other information as may be necessary" to allow the GAO "to review the reasonableness of the contract prices and the adequacy of the protection afforded the Government interest." (C.A. App. 11).

GAO asserts that it is entitled to examine company records concerning any costs that might "affect the price" quoted for the drugs supplied to the government, no matter how remote or tenuous the alleged connection. (C.A. App. 155-56). GAO acknowledges that these records may encompass virtually all of Merck's costs of doing business since, in the government's view, almost any cost incurred by a contractor affects each price that must be charged in order for the contractor to recover all of its expenses and to generate a company-wide profit. (C.A. App. 329-38). Indeed, GAO has been unable to define *any* category of Merck's records that would fall outside the scope of its access demand, including records relating to costs that were incurred twenty years ago and that were never allocated to products of the kind sold under the four contracts involved in this case. (C.A. App. 156, 329-38, 346-47, 351-54).

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[7] As the Third Circuit emphasized in its recent *SmithKline* decision, "GAO had no reason to believe that any impropriety had occurred in connection with the contracts, that any excess or unfair profits had been made, or that any violation of the law or other irregularity had occurred." *SmithKline Corp. v. Staats, supra,* slip op. at 5.

E. Proceedings Below

On October 2, 1974, Merck commenced this action in the United States District Court for the District of Columbia, under 28 U.S.C. §§ 1331(a) and 2201, seeking a declaratory judgment that the Comptroller General's demand for access to Merck's records exceeded his statutory authority. (C.A. App. 5-8). The United States subsequently intervened as a defendant and counterclaimed for an injunction to enforce the Comptroller General's demand. (C.A. App. 21-27).

Following discovery, the parties filed cross-motions for summary judgment. Merck contended that the Comptroller General's access demand was unlawful (1) because it was issued for unauthorized purposes—to gather private company cost data for individual congressmen and to conduct a general study of drug industry economics—rather than to enable GAO to conduct audits of the particular contracts listed in the demand letter (C.A. App. 456), and (2) because, in any event, records of costs are not "directly pertinent" to the four non-cost-based contracts that were the predicate of the GAO demand. (C.A. App. 457).

Although the government conceded that the access demand was not part of a contract audit, the district court did not determine the actual purpose underlying the demand. Instead, the court simply concluded that it was "satisfied that the survey proposed by the Comptroller in this case . . . will facilitate supervision of the procurement process and is within his authority." (Pet. App. C at 38a).

On the second issue, the nature of the documents that are properly subject to an access demand, the district court took an intermediate position. With respect to Merck's claim that no cost records are "directly pertinent" to the four contracts, the court concluded that direct manufacturing and overhead costs in producing the specific drug items procured by the government are "directly pertinent" to the contracts. (Pet. App. C. at 39a). However, the court also held—relying on the district court decision in the *Bristol* case—that the Comptroller General has no right to examine Merck's records of indirect and

unallocated costs such as its costs for "research and development, marketing and promotion, distribution, and administration" since those records are not "directly pertinent" to the contracts. (Pet. App. C at 40a).

Both the government and Merck cross-appealed.[8] On September 10, 1981, the court of appeals affirmed the district court's intermediate interpretation of the statute, in a per curiam opinion joined by Judges Robb and Tamm, with Judge Mikva concurring in part and dissenting in part.

REASONS FOR GRANTING THE PETITION

Merck has suggested that the petition filed by the government in No. 81-1273 should be denied because the issue presented was relevant only to the five cases generated by the Comptroller General's identical August 1974 access demands, and only two of those cases remain open. *See* Brief for Respondent in Opposition in *Bowsher v. Merck & Co., Inc.*, No. 81-1273. If this Court decides to grant plenary review in this case, however, its examination should not be confined to the truncated issue presented by the government. This conditional cross-petition supplements the government's petition in No. 81-1273 by adding two closely related questions that are necessary to enable the Court to resolve the dispute presented in this case.

First, Merck contends that no cost records are "directly pertinent" to the non-cost-based contracts involved in this case. This issue, like the question presented by the government in No. 81-1273, involves the proper interpretation of the access-to-records statutes. Merck contends that the court of appeals went too far in holding that records of certain of its costs are "directly pertinent" to non-cost-based contracts, within the meaning of

[8] While this case was pending before the court of appeals, Merck filed a conditional petition for a writ of certiorari before judgment in an effort to have the issues in this case reviewed by the Court in the event the government's petition for a writ of certiorari in *Bristol* was granted. Although the writ was granted in *Bristol*, Merck's petition was denied on December 8, 1980, 449 U.S. 1038 (1980). Merck subsequently participated, along with SmithKline Corp., as an *amicus curiae* before this Court in *Bristol*.

the access statutes. If Merck is correct, the judgment below must be narrowed. Standing alone, however, the government's petition would permit the Court to choose only between what, in Merck's view, are two erroneous alternative interpretations of the statutes, interpretations that would involve either affirmance of the judgment or expansion of it.

Second, Merck submits that the Comptroller General exceeded his statutory authority in this case by demanding access to Merck's records for unauthorized purposes—purposes other than to conduct the individual contract audits intended by Congress in enacting the access-to-records statute. If Merck is correct, the access demand should not be enforced.

1. Before this Court determines whether indirect and unallocated costs are within the scope of the Comptroller General's access-to-records authority, as the government argues, it is necessary to determine whether any cost records are "directly pertinent" to non-cost-based contracts such as those involved in this case. Similarly, even if the government were correct about the scope of the access-to-records provisions, the Comptroller General would not be entitled to examine any of Merck's records if the Comptroller General exceeded his authority by employing the access statutes for unauthorized purposes. Like the issue presented by the government, the issues raised in this cross-petition turn on an analysis of the language and legislative history of the 1951 access-to-records statute and an examination of the origin and nature of the Comptroller General's August 1974 access demand. Review of these questions thus will not pose any additional burden for the Court, should it decide to grant review of the government's petition in No. 81-1273.

2. If the Court decides to review this controversy, there are substantial reasons to conclude that the court of appeals erred in allowing any access to Merck's cost records.

a. The statutes on which the access-to-records demands are based—10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c)— grant the Comptroller General access only to books and records of the contractor that "directly pertain to" and "involve transactions relating to," the specific "contract." These

critical phrases defining the scope of the access authority are "words of limitation" that were intended to prevent "snooping" by the government. *Bristol Laboratories Division of Bristol-Myers Co. v. Staats*, 428 F. Supp. 1388, 1390 (S.D.N.Y. 1977), *aff'd*, 620 F.2d 17 (2d Cir. 1980), *aff'd by an equally divided court*, 451 U.S. 400 (1981); 97 Cong. Rec. 13377 (1951) (remarks of Rep. Hoffman).

Application of these words of limitation to the specific type of contract involved in this case demonstrates that none of Merck's cost records come within the scope of the access provision. As the government has acknowledged, all four of the contracts involved in this case are fixed-price rather than cost-based contracts. Pet. (No. 81-1273) at 3. In each instance, there was no actual negotiation of prices; no cost or pricing data were requested by the government purchasing agency in connection with the award of the contract; and Merck made no representations about its costs in quoting a price for each product. (C.A. App. 140-45).

Instead, unlike many "negotiated" government contracts, the purchasing agencies agreed to prices that either were based on Merck's published catalog prices at which these standard commercial items were sold to the public, or were based on other evidence of adequate price competition in the public marketplace. Although federal procurement statutes generally require the submission of cost and pricing information during contract negotiations, they made this information unnecessary here, because competitive market forces established the reasonableness of the contract prices.[9] In these circumstances, the contractor's cost records do not "directly pertain to" or "involve transactions relating to" these products.

There is substantial judicial support for this reading of the access statutes. Both the district court in *Lilly* and Judge Pell in his dissent from the Seventh Circuit's opinion in that case

[9] Under the Truth-in-Negotiations Act, 10 U.S.C. § 2306(f), contractors need not submit cost and pricing data to the government as part of the negotiation process "where the price negotiated is based on adequate price competition" or on "established catalog or market prices of commercial items sold in substantial quantities to the general public."

endorsed this interpretation.[10] In addition, the Ninth Circuit recognized in *Hewlett-Packard Co. v. United States,* 385 F.2d 1013, 1016 (9th Cir. 1967), *cert. denied,* 390 U.S. 988 (1968), that if "costs were not taken into consideration in arriving at the terms and conditions of the contracts in question," and if the proper focus is the specific terms and conditions of the contract that gave rise to the access demands, then records relating to costs "could not be said to directly pertain to, and involve transactions relating to, the contract, as so defined."[11]

b. The access demand issued to Merck exceeded the Comptroller General's authority because it was made for a purpose not authorized by Congress. The legislative history of the access-to-records provision demonstrates that it was enacted for the limited purpose of deterring or detecting abuses in the negotiation process by facilitating GAO audits of individual procurement contracts. Although the Comptroller General has shifted his ground several times in explaining the purpose of seeking access to Merck's cost records, he has explicitly disavowed any suspicion of impropriety and any interest in conducting audits of the Merck contracts that are the subject of the access demand. (C.A. App. 146).

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[10] The district court concluded:

> "Since each of the contracts was a fixed-price contract awarded to Lilly solely on the basis of competitive bids received or a comparison of Lilly's offered price with its standard catalog price, and since each contract was exempt from the Truth-In-Negotiations Act and Renegotiation Act, neither the negotiations nor performance terms of the contracts were in any way dependent upon, or directly related to, Lilly's costs. . . . " 574 F.2d at 925.

Judge Pell agreed. 574 F.2d at 918.

[11] The Ninth Circuit went astray, however by adopting a strained and unnatural definition of the term "contract." *See* 385 F.2d at 1016. The court inexplicably interpreted "contract" as "embracing not only the specific terms and conditions of the agreement, but also the general subject matter"—"the procurement of described property by the Government." *Id.* Nothing in the access provisions themselves or their legislative history justifies this novel interpretation, which has been sharply criticized. *See, e.g., Eli Lilly & Co. v. Staats, supra,* 574 F.2d at 918-19 (Pell, J., dissenting); Note, *Eli Lilly & Co. v. Staats: An Undue Expansion of the GAO's Investigatory Power Under the Access-to-Records Statutes,* 74 Nw. L. Rev. 122, 130-31 (1979).

The history of the statutes shows their limited purpose. The access-to-records clauses involved in this case were required by a statute enacted in October 1951. Pub. L. 82-245, 65 Stat. 700. That statute was modeled on an amendment to the First War Powers Act that had been adopted by Congress in January 1951. Act of January 12, 1951, 64 Stat. 1257. That amendment, enacted in response to crisis conditions created by rampant inflation during the Korean War, reinstated emergency authority created during World War II to negotiate increases in contract prices. The access authority was to be a check against fraud and overreaching in negotiating price adjustments to reflect the impact of wartime inflation on the contractors' costs. This emergency authority was granted only for an eighteen-month period. *See* S. Rep. No. 2686, 81st Cong., 2d Sess. 2-3 (1950); Act of January 12, 1951, § 2, 64 Stat. 1258.

Shortly after the adoption of the First War Powers Act amendments, its sponsor, Representative Hardy, learned that government procurement officers were also negotiating modifications to wartime contracts under two permanent procurement statutes—the Armed Services Procurement Act of 1947 and the Federal Property and Administrative Services Act of 1949. *See* 97 Cong. Rec. 13198 (1951). Those statutes lacked any access-to-records provisions. *Id.* "In order to plug this loophole," Representative Hardy introduced a bill to require the inclusion of access-to-records clauses in contracts negotiated under these statutes. *Id.* Both the House and Senate reports echo his explanation that the bill was intended "merely" to carry into the general procurement statutes "the same principle" embodied in the First War Powers Act amendments. *Id.* (remarks of Rep. Hardy); *see id.* at 13199, 13200; H.R. Rep. No. 791, 82d Cong., 1st Sess. 2 (1951); S. Rep. No. 603, 82d Cong., 1st Sess. 2 (1951).

Representative Hardy explained that his "main purpose in offering this bill was to place on the statute books a law which will act as a deterrent to improprieties in the negotiation of Government contracts." 97 Cong. Rec. 13198 (1951). The access-to-records provision was intended to provide such a deterrent by enabling the Comptroller General "to make effective audits" of the accounts of government contracting officers. *Id.* at 12611 (1951). As he explained:

> "[T]he audit which GAO performs is directed primarily to the accounts of the accountable officers of the Government and not to the contractors themselves. The GAO is required by law to take exceptions against accountable officers for erroneous or illegal payments." *Id.* at 13197.[12]

Congress underscored the limited purpose of the access authority—to facilitate the audit of the conduct of contract negotiations and the documentation for payment—by adopting an amendment to limit the Comptroller General's access right to a three-year period. As Representative Hardy explained, this limit corresponds to the three-year period in which GAO may audit the accounts of government disbursement officers and disallow erroneous payments. *Id.* at 13199.

Since the government has acknowledged that the Comptroller General's access demand was not issued for the purpose of conducting individual contract audits (C.A. App. 146), the district judge and the dissenting circuit judge in *Lilly* correctly concluded:

> "The Comptroller General's August 26, 1974 demand for access to Lilly's records exceeds his authority under the access-to-records clause in the contracts and under the statutes, 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c), because the Comptroller General is using that authority for a purpose which neither the contract clauses nor the statutes were designed to serve, namely, for the purpose of conducting a research study on the economics of the entire pharmaceutical industry." 574 F.2d at 924 (Pell, J., dissenting).

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[12] The access authority was intended to focus on auditing the contracting officer's handling of individual contracts. At the time the statute was adopted, GAO's primary function was the settlement of the accounts of government disbursing officers, a function that permitted GAO to disallow payments unless GAO was satisfied that "the proper procedures had been followed, and no fraud or other irregularity was involved." F. Mosher, *The GAO: The Quest for Accountability in American Government* 72-73 (1979).

See also Note, *Eli Lilly & Co. v. Staats: An Undue Expansion of the GAO's Investigatory Power Under The Access-to-Records Statutes*, 74 Nw. L. Rev. 122, 125-30 (1979).

3. Sound judicial administration and basic fairness require that this conditional cross-petition be granted if the Court grants the government's petition. If the Court undertakes to review the language and legislative history of the access-to-records statutes, it should have available the full range of alternative dispositions, not just the result reached by the court below or the more extreme one sought by the government. The court below affirmed the decision of the district court rejecting in part and accepting in part the position of each of the parties. (Pet. App. A, 3a; Pet. App. C, 38a-40a.) If the Court decides to consider the government's claim that it is entitled to examine all of Merck's cost records, it also should address Merck's position that the Comptroller General is not entitled to examine any cost records.

CONCLUSION

If review is granted in No. 81-1273, this cross-petition should also be granted.

Respectfully submitted.

PHILIP A. LACOVARA
RONALD A. STERN
PETER A. BARNES

HUGHES HUBBARD & REED

Attorneys for Petitioner
Merck & Co., Inc.

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Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS

No. 81-1472

In the Supreme Court of the United States

OCTOBER TERM, 1981

MERCK & CO., INC., PETITIONER

v.

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, AND UNITED STATES OF AMERICA

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether, with respect to a negotiated government contract in which a fixed price was set on the basis of the commercial market price and without reference to incurred costs, the Comptroller General is authorized by 10 U.S.C. 2313(b) and 41 U.S.C. 254(c) to examine the contractor's records of its costs, where government payments under the contract are used to defray those costs.

2. Whether the Comptroller General's request for access to records pursuant to 10 U.S.C. 2313(b) and 41 U.S.C. 254(c) was invalid because of the purpose underlying the request.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a)[1] is reported at 665 F. 2d 1236. The opinion of the district court (Pet. App. 35a-40a) is reported at 529 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals (Pet. App. 33a-34a) was entered on September 10, 1981. On December 4, 1981, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including January 8, 1982. On January 7, 1982 the government's petition for a writ of certiorari was filed in No. 81-1273. On February 5, 1982, the

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 81-1273. "C.A. App." refers to the joint appendix filed in the court of appeals.

conditional cross-petition for a writ of certiorari was filed pursuant to Rule 19.5 of the Rules of the Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The background of this proceeding is set forth in the government's petition for a writ of certiorari in No. 81-1273, at 3-7, and need not be repeated here. We note, however, that the dissenting opinion of Judge Mikva in the court of appeals concluded that the claims Merck presents in its cross-petition are "not new" (Pet. App. 9a) and "grossly overstate [the legislative] history, * * * and it is time to dispatch the contention once and for all" (*id.* at 10a).

ARGUMENT

Cross-petitioner urges (Pet. 2, 10) that the Court deny the government's petition for a writ of certiorari in *Bowsher* v. *Merck & Co.*, No. 81-1273 (filed Jan. 7, 1982), which presents the issue concerning GAO's access to cost records pursuant to the access-to-records provisions required by law. However, cross-petitioner does not contest that there is currently a conflict in the circuits on the construction of the access statutes or that a uniform interpretation of those statutes is important to the proper administration of the federal procurement system. For the reasons stated below and in the government's petition in No. 81-1273, we submit that the Court should decide that issue now and not postpone the resolution of the existing conflict.

In the alternative, cross-petitioner contends that if the Court grants the government's petition in No. 81-1273, it should also grant the instant conditional cross-petition for a writ of certiorari to consider two issues that are not involved in No. 81-1273 and do not present a conflict in the circuits. Cross-petitioner argues, first, that the access-to-records

provisions are inapplicable and afford no access whatever when neither the negotiation nor the performance of the contract related to the contractor's costs, and, second, that the Comptroller General's request for access was invalid because it was motivated by an improper purpose. The Court refused to consider these issues last Term in connection with *Staats* v. *Bristol Laboratories*, 451 U.S. 400 (1981) (see *Merck & Co.* v. *Staats*, 449 U.S. 1038 (1980); *SmithKline Corp.* v. *Staats*, 449 U.S. 1038 (1980)), and there is no greater reason to review them at this time. As we discuss below, cross-petitioner's arguments are without merit. Moreover, these arguments have been rejected by every court of appeals that has considered them. The cross-petition thus offers no reason to expand the carefully drawn issue presented in No. 81-1273 to include questions that have not divided the circuits and are not otherwise deserving of this Court's review. Accordingly, the conditional cross-petition should be denied.

1. Cross-petitioner contends that "none of Merck's cost records [came] within the scope of the access provision" because "all four of the contracts involved in this case are fixed-price rather than cost-based contracts" (Pet. 12). This construction of the access provisions is untenable and has been consistently rejected.

Cross-petitioner has pointed to nothing in the language of the statutes or their legislative history that would justify such a grudging interpretation of the access provisions. On the contrary, cross-petitioner's construction would defeat the congressional objective to guard against waste, extravagance and excessive pricing. Cross-petitioner's costs, even if neither directly the basis for the contract price nor the subject of discussions prior to execution of the contract, are nevertheless critical to an assessment of the advisability of continued adherence by the government to the negotiated procurement methods employed here. If cross-petitioner's

total costs are substantially lower than the prices paid by the government, the Comptroller General may recommend that the Department of Defense and the Veterans Administration adopt different procurement practices in the future. See *Hewlett-Packard Co.* v. *United States*, 385 F. 2d 1013, 1016 (9th Cir. 1967) ("[w]hile this appraisal could not affect these particular contracts, it could lead to the use of other methods of meeting future procurement needs"). And, as the court explained in *Eli Lilly & Co.* v. *Staats*, 574 F. 2d 904, 915 (7th Cir. 1978), the "argument that Congress could not have intended to inquire into wastefulness in contracts such as the one here in which drugs were supplied to the Government 'at a fixed price at or below the wholesale market price' * * * ignores the fact that the information sought by the Government may show that the prices it paid were nevertheless much too high."[2]

Furthermore, cross-petitioner's construction is at odds with the administrative interpretation adopted by GAO, which is entitled to deference and which Congress, although aware of the agency's position, has never disapproved.

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[2]This consideration is well illustrated by the testimony of GAO General Counsel Robert F. Keller before a congressional subcommittee:

> The catalog prices on Government orders [under sole source procurement for klystron tubes] frequently exceeded the company's current cost of production by more than 100 percent. * * *
>
> * * * * * *
>
> [T]he prices accepted by the General Services Administration and paid by the military services were substantially higher than seem reasonable in relation to the contractors' costs to manufacture and sell aircraft tires, and the Government experienced unnecessary costs in its procurement of these items * * * of approximately $10.7 million [in 1960] * * *.

Relation of Cost Data to Military Procurement: Hearings Before the Subcomm. for Special Investigations of the House Comm. on Armed Services, 88th Cong., 1st Sess. 7 (1963). See also pages 7-9, *infra*.

See *Relation of Cost Data to Military Procurement: Hearings Before the Subcomm. for Special Investigations of the House Comm. on Armed Services*, 88th Cong., 1st Sess. 3, 10-11, 23 (1963); *Comptroller General Reports to Congress on Audits of Defense Contracts: Hearings Before the Subcomm. on Military Operations of the House Comm. on Government Operations*, 89th Cong., 1st Sess. 44-45, 147, 513 (1965); *Competitive Problems in the Drug Industry: Hearings Before the Subcomm. on Monopoly of the Senate Select Comm. on Small Business*, 92d Cong., 1st Sess. 8018-8019 (1971).

GAO's interpretation has been presented to Congress on several occasions and fully explained in terms of the legislative history and purpose of the statutes and their construction by the courts. See, *e.g.*, *Relation of Cost Data to Military Procurement: Hearings Before the Subcomm. for Special Investigations of the House Comm. on Armed Services, supra*, at 8 ("Our experience indicates the need for careful examination into the reasonableness of accepting catalog or other established prices for negotiated procurements * * *. The fact that a product is listed in a manufacturer's catalog and offered to any customer is no assurance that competition actually is present or that the standard catalog price is reasonable"), 10-12 (discussing *Hewlett-Packard* case), 24-25 (relation between negotiation process and right of access); *Comptroller General Reports to Congress on Audit of Defense Contracts: Hearings Before the Subcomm. on Military Operations of the House Comm. on Government Operations, supra*, at 45-46 (discussing *Hewlett-Packard* case), 512 (statement on behalf of Machinery & Allied Products Institute discussing GAO's position); 115 Cong. Rec. 25801 (1969) (GAO memorandum setting forth the agency's position, accepted in *Hewlett-Packard*, that access "is not limited to that necessary to determine whether the contracts were performed in accordance with their

terms and whether the contracting officer had been defrauded or misled in entering into the contracts * * *, by what the parties may have considered or not considered in the course of negotiations * * *, [or] by the fact that the contract was performed by the delivery of 'off-the-shelf' items not specifically manufactured for the contract").

2. Cross-petitioner also contends (Pet. 13) that the access-to-records provision was enacted only for the "limited purpose of deterring or detecting abuses in the negotiation process by facilitating GAO audits of individual procurement contracts." Notwithstanding cross-petitioner's assertion, however, the access provisions are not confined to discrete audits of individual contracts in order to detect fraud and overreaching.

By their terms, the access-to-records provisions contain no limitation of the sort advanced by cross-petitioner. Rather, they apply to all government contracts negotiated pursuant to designated statutory authority. Nothing in the language of the provisions narrows their scope to unrelated audits of specific contracts or restricts their objectives to the elimination of fraud and overreaching. "Congress knew the significance and meaning of the language it employed." *Barrett* v. *United States*, 423 U.S. 212, 217 (1975).

The legislative history of the access-to-records statutes also refutes cross-petitioner's interpretation. This history has been canvassed in the government's brief in *Bristol* (80-264 Br. 15-19) and need not be repeated here. We emphasize, however, Congress' concern that "negotiated contracts * * * require close supervision and control * * *." H.R. Rep. No. 791, 82d Cong., 1st Sess. 2 (1951); S. Rep. No. 603, 82d Cong., 1st Sess. 2 (1951). Among other things, Congress feared that "aside from any intentional liberality on the part of the Government contracting officer, there is every chance in the world that the Government will come out on the short end of the deal." 97 Cong. Rec. 13198

(1951) (remarks of Rep. Hardy). See also *id.* at 13377 (remarks of Rep. Hoffman and Rep. Hardy). The debates contain repeated references to the need to determine whether prices in negotiated contracts were excessive, extravagant, or wasteful, and Congress "clearly understood * * * that there are a lot of other situations besides those involving fraud which might be uncovered" (*id.* at 13199) (remarks of Rep. Hardy). For instance, as one type of "information which would be vital in a study of a contract" (*id.* at 13376), Representative Hardy offered the following illustration:

> Another vivid example of how this authority would enable the GAO to do an effective job involves a study which my Subcommittee on Government Operations has been making on pricing practices in the procurement of automotive parts. We found one situation where the Government was buying parts from an automobile dealer who, in turn, was getting them from a parts distributor who, in turn was getting them from a small tool shop. Naturally, the price paid by the Government included profits upon profits and completely wasteful administrative and handling costs. It would be difficult, if not impossible, for GAO to detect such a situation without the right afforded in this bill.

Id. at 13198. All of these statements of congressional intent plainly extend beyond the audit of particular contracts to uncover fraud and belie cross-petitioner's constricted interpretation of the access-to-records statutes.[3]

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[3]We also note the Comptroller General's statement to Congress that "any abuses discovered by the General Accounting Office in exercising the authority contained [in the bill] promptly will be brought to the attention of the proper officials, and, if warranted, to the attention of the Congress," H.R. Rep. No. 791, *supra*, at 5; S. Rep. No. 603, *supra*, at 4. As GAO subsequently explained:

> The fact that, in final analysis, we may not be able to question the legality of particular contract transactions does not preclude our

Contrary to cross-petitioner's argument, those courts of appeals that have considered the question have held—as did the district court in this case (Pet. App. 36a-38a)—that the access-to-records provisions authorize the Comptroller General to examine a contractor's records in order to assess the reasonableness of the price charged the government and the adequacy of the protections afforded the government in negotiated procurements. See *Eli Lilly & Co.* v. *Staats, supra*, 574 F. 2d at 914-915; *Hewlett-Packard Co.* v. *United States, supra*, 385 F. 2d at 1016; *SmithKline Corp.* v. *Staats*, 668 F. 2d 201 (3d Cir. 1981). In *Eli Lilly*, the court expressly rejected the argument that the access-to-records provisions "were designed only to uncover 'improprieties in the negotiation of Government contracts,' " concluding instead "that controlling fraud was not the only purpose of the legislation and that another concern of the legislators was with excessive pricing" (574 F. 2d at 914). Similarly, the court in *Hewlett-Packard* held that the access provisions were not limited either to audits of individual contracts or to suspected fraud (385 F. 2d at 1016):

> Production costs directly pertain to that subject matter, because if out of line with the contract price, the contract may have been an inappropriate means of meeting this particular procurement need of the Government. While this appraisal could not affect

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reporting to the Congress and to the responsible administrative agencies that such transactions are wasteful or extravagant or that a particular contract transaction illustrates the need for an improvement in existing procurement or management procedures.

Comptroller General Reports to Congress on Audits of Defense Contracts: Hearings Before the Subcomm. on Military Operations of the House Comm. on Government Operations, 89th Cong., 1st Sess. 48 (1965) (statement of Comptroller General Campbell).

these particular contracts, it could lead to the use of other methods of meeting future procurement needs. * * *

Hewlett-Packard contends, in effect, that the sole purpose of the examination right accorded by section 2313(b) and clause 10 of these contracts, is to enable the Comptroller General to find out whether the particular contracts which give rise to the examination had been performed in accordance with their terms and whether the contracting officer had been defrauded or misled in entering into the contract.

We find nothing in the words of the statute, its legislative history, or administrative interpretation, or in the impact of other statutes, which supports this view. On the contrary, it seems to us that if such a limited scope of examination had been intended by Congress it would have found the means to so indicate. The term "contract" could have been given a restricted meaning, or the scope of the permissible examination could have been specifically limited to lines of inquiry relevant to the legality and faithful performance of the particular contract giving rise to the examination.

In the present case, the district court determined that "the survey proposed by the Comptroller * * * will facilitate supervision of the procurement process and is within his authority" (Pet. App. 38a).[4] In light of the foregoing

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[4]This determination was clearly correct and amply supported by the record. In addition, every court that has considered the purpose underlying the Comptroller General's requests to the pharmaceutical companies has agreed that, at the least, it consisted in part of the intention to review the reasonableness of the contract prices and the adequacy of the protection afforded the Government's interest. See *United States* v. *Abbott Laboratories*, 597 F. 2d 672, 674 (7th Cir. 1979); *Eli Lilly & Co.* v. *Staats, supra*, 574 F. 2d at 910; *SmithKline Corp.* v. *Staats, supra*, 668 F. 2d at 207.

authorities, the court's conclusion is manifestly correct. And, since the Comptroller General's request was predicated on a proper purpose, it is immaterial whether, as cross-petitioner alleges, he was motivated by any additional purposes that, arguendo, would not be sufficient by themselves to sustain the validity of the request. See, *e.g.*, *United States* v. *LaSalle National Bank*, 437 U.S. 298, 313-317 (1978); *Mt. Healthy Board of Education* v. *Doyle*, 429 U.S. 274, 285-287 (1977).[5]

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[5]We also doubt that cross-petitioner should be heard to question the alleged additional purposes for GAO's request. The contracts at issue in this case clearly included the required record access clauses, and the Comptroller General has now invoked those provisions to seek access to records for a purpose authorized by Congress. No rule of law excuses a party from performing a contract because it does not approve of the other party's purpose in demanding performance, and petitioner should not be allowed to inquire further into the Comptroller General's motives.

Even if cross-petitioner were correct in arguing that the access-to-records provisions do not authorize a GAO research study, it would not follow that access to the records should be barred. Cross-petitioner confuses an improper motive with a motive that is perfectly legitimate but not a sufficient ground, standing alone, for access. There has been no suggestion that a research study is forbidden by law or is "improper" in any way.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

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and

UNITED STATES OF AMERICA

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

PHILIP A. LACOVARA
RONALD A. STERN*
PETER A. BARNES

HUGHES HUBBARD & REED
1201 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 626-6200

Attorneys for Petitioner Merck & Co., Inc.

**Counsel of Record*

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ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER [1]

1. The government contends that the statutory construction issue is "an important one with broad implications for the Comptroller General's ability to fulfill his statutory mandate." (Reply Mem. at 4). This assertion remains unsupported; the government still has failed to point to a single instance since these related cases arose in 1974 in which the GAO has been hindered in its ability to carry out a review project because of

[1] Merck's non-wholly-owned subsidiaries are listed in footnote 1 of the conditional cross-petition filed on February 5, 1982, as required by Rule 28.1. There have been no changes in that list.

the statutory interpretation on which three courts of appeals have agreed.[2] Furthermore, the last three courts of appeals to consider the issues raised in this and the related pharmaceutical cases all reached the same result, so that the circuit conflict asserted by the government is, in fact, more apparent than real. Accordingly, Merck urges the Court to deny the government's petition for certiorari in No. 81-1273 and to allow this eight-year conflict to come to an end.

2. If the government's own arguments for granting its petition in No. 81-1273 are accepted, however, they would warrant the granting of Merck's cross-petition as well. If the issues presented are truly broad-ranging and essential to the proper functioning of the GAO, then the questions raised in the conditional cross-petition also should be answered. There is substantial reason to conclude that the government's access-to-records authority does not extend to any cost records when the contract at issue is not cost-based. By denying the conditional cross-petition, the Court may foreclose itself from being able to reach that conclusion. The government should not be allowed to place blinders on the Court's view of the statutes and the pertinent legislative history.

3. The government is simply wrong in asserting that Merck "has pointed to nothing in the language of the statutes or their legislative history that would justify" the interpretation of the access-to-records statutes advanced by Merck and the other pharmaceutical companies. (Br. in Opp. at 3). The conditional cross-petition refers to the extensive legislative history supporting Merck's argument that Congress deliberately used the statutory language "directly pertains to" as a phrase of limitation, in order to restrict the scope of the Comptroller General's

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[2] *See Bristol Laboratories Division of Bristol-Myers Co. v. Staats*, 620 F.2d 17 (2d Cir. 1980), *aff'd by an equally divided court*, 451 U.S. 400 (1981); *SmithKline Corp. v. Staats*, 668 F.2d 201 (3rd Cir. 1981), *conditional petition for cert. before judgment denied*, 449 U.S. 1038 (1980); *Merck & Co., Inc. v. Staats*, 665 F.2d 1236 (D.C. Cir. 1981), *conditional petition for cert. before judgment denied*, 449 U.S. 1038 (1980).

authority to review the records of government contractors. *See generally* pages 11 to 15 of the cross-petition.[3]

The legislative history reenforces the plain meaning of the statutes and shows that Congress did not intend to authorize the GAO to use its audit powers to determine the abstract "reasonableness" of the prices paid under fixed-price contracts for standard commercial items sold to the government at—or, as here, below—the price paid by the general public. Two of the judges in the *Lilly* case (District Judge Holder and Circuit Judge Pell) found the full legislative history persuasive,[4] as did one of the subsequent criticisms of the Seventh Circuit's contrary conclusion.[5]

4. The government contends that Merck's construction of the access-to-records statute "is at odds with the administrative interpretation adopted by GAO, which is entitled to deference and which Congress, although aware of the agency's position, has never disapproved." (Br. in Opp. at 4). Accordingly, the government would have the Court ignore the merits of Merck's arguments.

The government's position, however, is not supported by the facts. The GAO's current interpretation of the access-to-records statutes is quite different from the GAO's contemporaneous construction of the statute and thus is not entitled to any deference. For example, during Congress' consideration of the statutes now at issue, the Acting Comptroller General provided an explanation of the bill to the House and Senate committees. That explanation cited a congressional floor debate explaining that the purpose of the statute was "to determine whether or not there is fraud or overreaching or

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[3] For a full discussion of the legislative history, see "Brief of Merck & Co., Inc. and SmithKline Corp., *Amici Curiae*," filed in *Staats v. Bristol Laboratories Division of Bristol-Myers Co.*, No. 80-264, 451 U.S. 400 (1981), at 12-19.

[4] *See Eli Lilly & Co. v. Staats*, 574 F.2d 904, 918-19 (7th Cir.) (Pell, J., dissenting), 919-26 (reprinting decision below), *cert. denied*, 439 U.S. 959 (1978).

[5] *See* Note, *Eli Lilly & Co. v. Staats: An Undue Expansion of the GAO's Investigatory Power Under the Access-to-Records Statutes*, 74 Nw. L. Rev. 122 (1979).

whether [the contractors] have done anything untoward." H.R. Rep. No. 791, 82d Cong., 1st Sess., at 4 (1951). At that time, GAO correctly understood that the access-to-records statutes were intended solely to grant the agency authority to examine records in order to deter or detect abuses in procurement. For a complete discussion of the point that the GAO's current interpretation is not entitled to deference, because it is neither consistent nor long-held, see "Brief of Merck & Co., Inc. and SmithKline Corp., *Amici Curiae*," *supra*, filed in *Staats v. Bristol Laboratories Division of Bristol-Myers Co.*, No. 80-264, 451 U.S. 400 (1981), at 19-23.

In this case, the Comptroller General explicitly has disavowed any suspicion of impropriety by Merck or the government contracting officers in the negotiation or performance of these contracts. If this Court decides to review this case, then the Court should consider the merits of Merck's arguments regarding the proper scope of the statute and should not automatically defer to GAO's latest shift in position.[6]

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[6] In support of its argument that what the GAO is seeking to do in the pharmaceutical industry is not a unique and unprecedented use of the access-to-record statutes, the government refers to other alleged instances of the use of these statutes to prepare reports on "the effectiveness of government procurement activities in particular industries." (Reply Mem. at 3 & n.3). In fact, the GAO acknowledged in the trial court that none of the reports involved examination of non-cost-based contracts in order to analyze procurement techniques in "particular industries."

(a) What the government identifies as a report on the "firearms industry" was simply the routine audit of cost information submitted by three contractors in connection with the negotiation of their cost-based contracts for a single weapon (the M-16 rifle) to determine whether costs had been overstated by the contractors. C.A. App. 484-85.

(b) The report on the "steel fabrication industry" involved audits of cost information submitted by a single contractor in connection with contracts for the bomb bodies for 250-pound and 500-pound bombs. C.A. App. 485.

(c) The report on the "steel plate (HY-80) industry" dealt with procurement of a single specialized type of steel plate used in the construction of nuclear submarines. The report focused on whether the supposed "catalog prices," relied upon by the Navy to exempt the contractor from submission of

(footnote continues)

5. Finally, the government attempts to side-step the question whether GAO's statutory access powers may properly be used to demand access to confidential corporate records for a purpose not authorized by Congress. The government's argument is: "No rule of law excuses a party from performing a contract because it does not approve of the other party's purpose in demanding performance . . . ." (Br. in Opp. at 10 n.5). This contention overlooks two basic facts. First, the GAO is a government agency created by Congress, and it has only those rights and prerogatives that Congress has seen fit to confer on it. Second, the access clauses in the contracts were included only because Congress required their insertion; they do not enlarge the GAO's powers beyond those that Congress intended to grant. Thus, the questions posed by Merck are integrally related to the question framed by the government: What is the proper scope of the GAO's access-to-records authority?

(footnote continued)

pricing information, had genuinely involved a standard commercial item sold in substantial quantities to the general public. The report concluded that there was no private commercial market for the products. C.A. App. 485. Merck has never denied the GAO's right to use the access statutes to determine whether the contracts in this case were properly found by the contracting officers to be exempt from submission of cost and pricing information.

(d) The report on the "petroleum storage industry" merely "evaluate[d] the relative economy to the Government of using new commercial storage facilities as [compared] to utilizing Government facilities for the storage of petroleum." C.A. App. 485. It was not an examination of cost records underlying non-cost-based contracts.

(e) The "aircraft tire industry" report consisted of a report on the General Services Administration's procedure for establishing the Federal Supply Schedule price for certain specialized military aircraft tires used by the Air Force and the Navy. C.A. App. 485. Once again, despite the implication in the government's brief, it was not a report that involved examination of cost records of non-cost-based contracts.

CONCLUSION

If review is granted in No. 81-1273, Merck's cross-petition also should be granted.

Respectfully submitted.

PHILIP A. LACOVARA
RONALD A. STERN
PETER A. BARNES

HUGHES HUBBARD & REED

Attorneys for Petitioner
Merck & Co., Inc.

March 1982.

NO. 81-1472-CFX	TITLE Merck & Co., Inc., Petitioner
Vide 81-1273	v. Charles A. Bowsher, Comptroller General of the United States and United States

DOCKETED	COURT
February 5, 1982	United States Court of Appeals for the District of Columbia Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Ronald A. Stern
	Counsel for Respondents: Solicitor General
February 5, 1982	Petition for writ of certiorari filed. (Record filed).
March 8, 1982	Order extending time to file a response to the petition until March 24, 1982.
March 23, 1982	Brief for the respondents in opposition filed.
Mar. 24, 1982	DISTRIBUTED. 4-16.
March 31, 1982	Reply memorandum for the petitioner filed. (D).
Apr. 19, 1982	Petition GRANTED. The case is consolidated with 81-1273 and a total of one hour is alloted for oral argument.

June 8, 1982	The government will file its opening brief on July 2, 1982. Merck & Co. will file its brief on Aug. 6, 1982.
July 6, 1982	Brief for petitioners in 81-1273 filed. (Vide: 81-1273).
July 6, 1982	Joint appendix filed. (Vide: 81-1273).
Aug. 2, 1982	Brief, amicus curiae, of The Aerospace Industries Association of America, Inc. filed. (Vide: 81-1273).
Aug. 6, 1982	Brief, amicus curiae, for Smithkline Corporation filed. (Vide: 81-1472).
Aug. 6, 1982	Brief for Merck & Co., Inc. filed. (Vide: 81-1273).
Sept. 13, 1982	Brief for respondents in No. 81-1472 and reply brief of petitioners in No. 81-1273 filed. (Vide: 81-1273).
Sept. 13, 1982	Order extending time to file the respondent's brief in 81-1472 and reply brief for the petitioners in No. 81-1273 until Sept. 14, 1982.
Sept. 15, 1982	CIRCULATED.
Nov. 10, 1982	Reply brief for Merck & Co., Inc. filed. (D). (Vide: 81-1273)
Dec. 1, 1982	ARGUED.